



May 2, 2001

Ms. Sandra M. Zimmerman
Assistant City Attorney
City of Austin
P.O. Box 1546
Austin, Texas 78767-1546

OR2001-1794

Dear Ms. Zimmerman:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 146688.

The City of Austin (the "city") received a request for information that was submitted to the city by a bidder, Motorola, Inc. ("Motorola"). You inform this office that Motorola marked parts of the requested information as being proprietary. You state that the city will release to the requestor the responsive information that Motorola did not mark as being proprietary. You also inform us that Motorola has authorized the city to release the "Executive Summary" portion of the requested information. You request a determination of whether the remaining responsive information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. Under section 552.305 of the Government Code, you notified Motorola of the request for information and of its right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances). Motorola submitted comments to this office. We have considered Motorola's comments and have reviewed the information that the city submitted.¹

¹Motorola's comments refer to "the Technical Exhibits identified in the Proposal and the resulting Communications Systems Agreement between the parties." Motorola further states that the referenced "Technical Exhibits" also are found in the Motorola proposal "in Sections 6, 9 and 16 as well as in Book 5." We note, however, that the information submitted by the city consists of the following: a document titled "Proposal to the 9-1-1 RDMT Radio Coalition," documents titled "Book 4, Cost Proposal; Section 17, Pricing Considerations," five pages pertaining to "Motorola Customer Financing," and 59 pages that contain pricing

The city asks whether the submitted information is excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The city informs us that the submitted information "has been marked as confidential by Motorola[.]" Information that is subject to the Act is not confidential simply because the party that submits the information anticipates or requests confidentiality. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Neither the city nor Motorola has informed us of any other law, nor are we aware of any other law, under which any of the submitted information is deemed to be confidential. Therefore, none of the submitted information is excepted from disclosure under section 552.101 of the Government Code.

Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information for which it is demonstrated, based on specific factual evidence, that disclosure would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). The Texas Supreme Court has adopted the definition of "trade secret" under the Restatement of Torts, section 757, which holds a "trade secret" to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. *It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business* [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

information. Thus, based on Motorola's comments and our review of the submitted information, it does not appear that the information that Motorola describes in its comments is at issue at this time. *See* Gov't Code § 552.301(e)(1)(D) (providing that governmental body that requests attorney general decision must submit to this office for review either the specific information requested or representative samples if the requested information is voluminous). Nevertheless, we have considered the exceptions that the city raises and Motorola's comments with regard to whether the information that the city submitted may be withheld from disclosure.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If, as is the case here, the governmental body takes no position on the application of the "trade secrets" component of section 552.110 to requested information, this office will accept a private person's claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.² *See* Open Records Decision No. 552 at 5 (1990).

Motorola indicates that the information submitted by the city relates to a proposal for a radio communications system. Motorola states that the proposal includes "Technical Exhibits" that it considers to be "Confidential and Proprietary or Trade Secret information" that is protected from disclosure under section 552.110. We note, however, that the submitted documents pertain almost exclusively to pricing. Motorola does not argue that its pricing information qualifies as trade secret information under section 552.110. Moreover, this office has concluded that section 552.110 ordinarily does not protect pricing information. *See* Open Records Decision No. 319 at 3 (1982) (applying statutory predecessor). We therefore conclude that the submitted information is not excepted from disclosure under section 552.110.

We note, however, that the submitted information is copyrighted. An officer for public information must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception to disclosure applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, he or she must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 8-9 (1990).

²The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS, § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

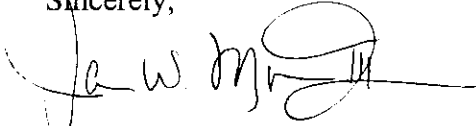
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J W Morris III', with a long horizontal flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/rr

Ref: ID# 146688

Encl: Submitted documents

cc: Ms. Patricia Thibodeau
Senior Marketing Analyst
M/A-COM, Inc.
1011 Pawtucket Boulevard, M/S 106
Lowell, MA. 01853-3295
(w/o enclosures)

Mr. Mark Moon
MECI Vice President
Western Division
Motorola, Inc.
9980 Carroll Canyon Road
San Diego, California 92131
(w/o enclosures)